No. 1770.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. CLARK,

Appellant,

vs.

THE ROSARIO MINING AND MILLING COMPANY, a Corporation,

Appellee.

APPELLANT'S BRIEF.

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Filed in San Francisco, California, on the.....

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Clerk U. S. Circuit Court of Appeals.

THE JAMES H. BARRY CO.
1122-1124 MISSION ST.

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APPELLANT'S BRIEF.

May it please the Court:

This is not an appeal on technical grounds. While the essential facts are few and the questions of law are clear, the amount involved is large and the rights substantial.

The important question is whether or not in a suit for the specific performance of a contract which withholds from the complainant the right to specific performance, a Court of Equity may award damages for a breach of the contract, and thus deprive the defendant of his constitutional right to a jury trial.

A.

STATEMENT OF THE CASE.

The appellee, the Rosario Mining and Milling Company, in the Court below sued the appellant, Charles W. Clark, with Frank L. Sizer and William Falconer, as the administrator of the estate of Edward L. Whitmore, deceased, to require them specifically to perform a contract which the complainant alleged bound them to buy for $400,000, certain mining property in the Republic of Mexico of which the complainant claimed to be the owner.

In order to make a clear statement of the facts upon which this appeal is based, it is necessary to state briefly certain matters which it is disclosed by the record occured prior to the commencement of the suit.

Sizer and Whitmore, whose personal representative was sued, were respectively the confidential mining expert and private secretary of Charles W. Clark.

The appellee entered into negotiations with Clark in 1899, and subsequent negotiations were carried on between them through Sizer and Whitmore, under successive working options until about May 1, 1902, when the writing in suit was dated. During all of this time Sizer represented Clark at the mines; and Whitmore carried on the business at Clark's home, then in Montana. Clark never saw the property and he signed the writing in suit at the solicitation of Sizer.

After certain preliminary steps taken in its suit the complainant filed the amended and supplemental bill, the defendant Clark demurred thereto, and subsequently filed the second amended answer on which the case went to final hearing. These pleadings are the only ones involved in this appeal, and for convenience in this brief are designated respectively as the bill, demurrer and answer.

In its bill the complainant by copy set out the writing of May 1, 1902, on which the suit was brought, the substance whereof is as follows:

The Rosario Mining and Milling Company is named as the party of the first part, and Clark, Whitmore and Sizer as the parties of the second part. It is recited that "Whereas the first party is the owner of the mine and mining property known as the Rosario Mine," which is situated in the State of Chihuahua, in Mexico, and is described with particularity; and, after reciting the preliminary contracts, it continues, "Whereas, in " each of said contracts the said second parties bound " themselves to examine the title," etc.; and "Whereas, " the said second parties have, after examination of said " property and the titles thereto, notified the first party " that the second party is satisfied with the titles to said " property in the first party." The writing then continues as follows:

"Whereas, it is the desire of each of the parties to " further develop said property by the development

" work hereinafter stipulated to the end of more cer-
" tainly determining the value of said property, so that
" the first party may be able to sell the same to the best
" advantage to any purchaser which it may find and in
" the event of a sale at a figure above $600,000 to other
" parties that the first party will out of such proceeds
" compensate the second parties in part for the expend-
" itures they have made in development of said prop-
" erty, as herein provided; and

"Whereas, in order to carry out this arrangement and
" purpose, and to afford the second parties an oppor-
" tunity to buy said property at the price of $600,000,
" in the event of a failure of the first parties to make
" a sale of said property during the life of this contract,
" at more than $600,000, and to afford the second par-
" ties a preference right to buy said property at the
" price of $600,000, as herein stipulated; and

"Whereas, it is necessary to keep said property open
" and the operating plant in operation; and

"Whereas, the second parties as a consideration in
" part for this option contract is desirous of keeping
" open said offer to buy said property at the price of
" $400,000, subject to the right of the first party to ac-
" cept the offer at any time during the life of this con-
" tract;

"Now, therefore, it is hereby mutually agreed be-
" tween the parties hereto, as follows:

"1. The second parties offer to the first party to buy
" from the first party said property, and to pay to the

" first party therefor the sum of ($400,000) Four Hun-
" dred Thousand Dollars, American Gold, at Fort
" Worth, Texas, and to make said payment within thirty
" days after being notified of an acceptance by the first
" party of said offer; provided, however, that if the said
" offer is accepted within the next four months, the sec-
" ond party shall have until Sept. 1st, 1902, to make
" such payment. The first party concurrently or as
" near as may be with such payment to cause to be
" transferred to the second parties, the titles which the
" first party through its directors or otherwise has in
" and to said property. And the second parties agree
" to leave said offer open for one year from this date,
" subject to the acceptance of the first party at any time
" during the said year. Said titles having been exam-
" ined by the second parties it is agreed that the same
" are good and sufficient.

"2. The first party, reserving the right to sell said
" property and contract with reference thereto to other
" parties, gives and grants to the second parties an op-
" tion to buy said property at the end of the said year,
" to wit, on May 1st, 1903 (said option to be exercised
" or forfeited), at the price of $600,000 cash or its equiv-
" alent, American Gold, provided the first party shall
" not have sooner sold said property, or made a *bona fide*
" contract to do so; provided further that before mak-
" ing any offer to sell said property at $600,000 or less
" to other parties, the first party shall give to the second
" parties a preference right to buy the same at said

" price so offered to others, and to that end shall notify " the second parties of such contemplated sale or offer, " and the second party shall promptly exercise its pref- " erence right upon being so notified and afforded an " opportunity to do so, and shall have 30 days after " electing to take the property in which to make the " payment for the property, whereupon concurrently " or as near as may be the first party shall cause said " property to be conveyed to the second parties. If the " second parties upon being so afforded an opportunity " to exercise such preference right to purchase shall fail " to do so, then such right shall cease.

"3. The first party reserving full rights to make any " sale it may choose of said property, during the year " agrees that if during the year up to May 1st, 1903, the " first party shall sell said property or make a valid con- " tract of sale thereof to other parties, resulting in a " sale of the same, at a price greater than $600,000, it " shall pay to the second parties $50,000 out of the ex- " cess of the purchase price above $600,000, except that " if such excess does not amount to $50,000, then such " amount as the purchase price upon such sale shall ex- " ceed $600,000. Provided, that if the purchase price " upon such sale shall not exceed $650,000, the second " parties shall have the preference right to take the " property at the price of $600,000.

"Provided, also, that in the event of a sale to other " parties, partly on a credit, the payment of the $50,000 " or the excess over $600,000, of less than $50,000, if

" under this contract the second parties shall become " entitled to it, shall be apportioned among the time " payments of the purchase money upon such sale, in " proportion as it shall bear to the whole, provided, " however, that not less than one-half of the amount to " which the second parties shall be entitled shall be " paid out of the first cash payment."

After certain provisions giving the first party the right of examination, the writing bound the second parties to remain in possession of the property for a period of ninety days, and to do certain stipulated work. It then provided:

"After the end of the 90 days or the completion of " said work, if sooner completed, the second parties " shall, at the option of the first party, continue the " operations of the mill and cyanide plant and to keep " the mine unwatered, and for the purpose of paying " expenses shall have the bullion output of said mill and " cyanide plant, and if the output shall exceed such ex- " penses then the excess shall be paid to the first party " as royalty, but no other royalty shall be paid out of " such output, but the ore so worked during that time " shall not be sorted or picked, nor the rich streaks " taken out. Provided, that after said work so specified " shall have been completed and in any event after 90 " days, the first party shall have the right at any time " to take possession of said property and all of the im- " provements, betterments, machinery, and appliances,

" tools, apparatus, buildings and supplies of every kind " useful in the operation of the property; and as to all " such supplies as under either of said preceding con- " tracts the first party is to pay for, upon said property " being turned over to it an inventory shall be made and " the same to be paid for at their reasonable value, it " being understood that in determining what supplies " and materials are to be turned over to the first party " without being paid for and what of such supplies are " to be paid for, said original contracts are to be looked " to and to govern."

The writing next provided for certain settlements, and then provided:

"8. In the event of an acceptance by the first party " of the offer of the second parties to buy said property " at the price of $400,000, and a failure or refusal of " the second parties to make good the offer to buy said " property, then the second parties shall be liable to " the first party in damages in the stipulated sum of " $100,000. The object of this clause of this contract " is to make the measure of damages certain, whereas " without such stipulation by reason of the peculiar " character of the property and situation and surround- " ings of the parties, it would be impossible to arrive " at any just and correct measure of damages by proof " in a court of law. And in the event the first party " shall not sell said property to other parties or con- " tract to do so according to the terms of this contract

" and the second parties shall under the provisions of " this contract become entitled to exercise their option " to buy the said property at $600,000, and shall elect " to exercise said option and shall thereupon offer to " purchase said property at said price and the first " party shall fail or refuse to comply with this contract " to sell their said property at that price, then the first " party shall be liable to the second parties in liquidated " damages to the amount of $100,000. This shall not " deprive the second parties of the right to waive dam- " ages and have specific performance of this contract."

The other provisions of the contract not quoted concern matters of detail and are unimportant on this appeal.

Transcript, pp. 23-36.

In its bill the complainant alleged the death of Whitmore, the appointment of Falconer as the administrator of his estate, and that Falconer and Sizer were both residents of the State of Montana and not amenable to process from the Court in which the suit was brought, that is the Circuit Court for the Northern District of California. It alleged further that after the expiration of one year from the date of the contract it had tendered its deeds to Clark, and to Sizer, and to Falconer in his representative capacity, and that they had failed and refused to accept them or to pay the $400,000

which it claimed to be due to it. The prayer was for specific performance and general relief.

Transcript, pp. 22 and 23.

Neither Sizer nor Falconer ever subjected themselves to the jurisdiction of the Court. Clark demurred to the bill generally and specially, and now makes no contention upon the special demurrer. The general demurrer was on the ground that the complainant had not by its bill made such a case as entitled it to any relief in a Court of Equity, and that it showed no substantial right or equity, and *"it appears by complain-"ant's own showing that it is not entitled to the relief "prayed for in and by said bill."*

Transcript, p. 43.

On hearing and argument the demurrer was overruled and the defendant Clark required to answer.

Transcript, p. 45.

In his answer the defendant Clark set up at length certain facts which he alleged showed a conspiracy to defraud him between the officers and agents of the complainant and his trusted employees and co-contractors, Sizer and Whitmore; that his assent to the contract in suit was obtained by false representations made to him in pursuance of this conspiracy; that the title of the complainant to the property is so defective as to be unmerchantable; that the provisions of the contract were

unconscionable in that they purported to hold him bound while the complainant reserved the right of nullification of the same; and that at the time of signing the contract he believed that under its terms he would never be called upon to specifically perform the same.

Transcript, pp. 46-122.

The evidence in the case was taken wholly by deposition out of the hearing of the Court.

In the pleadings, in the evidence and in the briefs no suggestion was made that the defendant Clark would be called upon to defend against money demand upon him alone for damages for a breach of contract.

On the final hearing the defendant Clark objected to the jurisdiction of the Court in Equity making any decree in the absence of his co-defendants, who were equally bound with him by the terms of the contract, if, indeed, he was bound.

In the opinion upon which the decree was entered, it was determined:

1st: That on the conflicting evidence of fraud the defendant Clark had not prevailed.

Transcript, pp. 137-159.

2nd: That the issue of title would be disposed of summarily.

Transcript, p. 159.

3rd: That the complainant by the terms of its contract had barred itself of the right to have specific performance.

Transcript, pp. 159-164.

4th: That in such a suit, under the general prayer, the Court might award a money judgment for damages for breach of contract.

Transcript, pp. 164-167.

In this opinion no consideration was given to the inequitable provisions of the contract itself, nor to the fact that it bound the defendants and did not bind the complainant, and no disposition was made of the co-defendants of the appellant.

In a supplemental opinion it was determined that the complainant alone can object to the dismissal of a suit in equity as to the co-contractors of the only defendant before the Court.

Transcript, pp. 167-170.

The decree follows the ordinary form of a judgment at law on a money demand.

Transcript, p. 132.

B.

SPECIFICATIONS OF ERRORS.

In order to comply with the spirit of the rule regarding specifications of errors, to prevent needless repetition in this brief, and to present the points relied upon in their logical order, the following specification is made, with proper references to the printed record:

First: The Court erred in assuming and in retaining jurisdiction in equity of this suit because by its contract the complainant had barred itself of the right to sue for specific performance.

Assignments, I, II, III, and IV, Tr., pp. 1531-1533.

Second: The Court erred in not dismissing this suit and in not remanding the complainant to a Court of Law for the trial of its right to a money judgment for breach of contract, in accordance with the provisions of Article VII of the Amendments to the Constitution of the United States.

Assignments I, III, V, and VI., Tr., pp. 1531-1534.

Third: The Court erred in refusing to consider and in summarily disposing of the defense based on the issue

of defective title made by the pleadings and the evidence.

Assignments VII, VIII, IX, X, and XI, Tr., pp. 1534-1535.

Fourth: The Court erred in overruling the demurrer and in granting relief in equity to the complainant because of the unconscionable nature of the contract in suit, and of the provisions which permitted its nullification by the complainant.

Assignment I, Tr., p. 1531.

Fifth: The Court erred in making any decree other than one of dismissal in the absence of Sizer and the Administrator of Whitmore's Estate.

Assignment XII, Tr., p. 1536.

C.

ARGUMENT.

The opinion upon which the decree is based contains a construction of the legal effect of the contract. The construction adopted by the Court is satisfactory to the appellee, since it has not appealed from the decree. The construction is fully in accord with the law and with the argument presented on behalf of the appellant to the lower Court. As stated in the opinion, the proper construction is as follows:

"The contract in question was prepared by the com-
" plainant's attorneys, and was fully executed by the de-
" fendant Clark. Even if credence be withheld from
" his denial that before he signed the agreement he sub-
" mitted it to his attorney, the fact is uncontroverted
" that the form and phrasing of the various provisions
" and stipulations of the contract are the handiwork of
" lawyers acting upon behalf, and in the interest, of
" complainant.

"By paragraph eight of the contract, it was provid-
" ed that in case of the failure of defendants to pay
" $400,000 upon notice of the acceptance by the com-
" plainant of their continuing offer they should be 'lia-
" 'ble to the first party in damages in the stipulated sum
" 'of $100,000.' This is the only remedy or relief ex-
" pressly provided for. True, if this were all, there is
" very eminent authority for the view that it does not
" follow that the parties intended that complainant
" waive its right to require specific performance, and
" that therefore it can not be denied such remedy by
" reason of this clause. But in this contract the parties
" went further in disclosing their intention. In the
" same paragraph it is provided that if 'the party shall
" 'fail or refuse to comply with this contract to sell their
" 'said property at that price, then the first party shall
" 'be liable to the second parties in liquidated damages
" 'to the amount of $100,000. This shall not deprive the
" 'second parties of the right to waive damages and have
" 'specific performance of this contact.'

"It is impossible to conceive why, if it was intended " that the complainant should retain its right to require " specific performance, counsel who drew this contract " should have omitted expressly to reserve to it such " right, when, in the same paragraph they prescribed a " like penalty of liquidated damages in favor of the de- " fendants, coupling therewith, however, the express " provisions that the penalty should not be deemed to " be a waiver of the right to compel specific perform- " ance. It must be presumed that, the attorneys who " drew the instrument and the officers of the company, " who, upon its behalf, executed the instrument, were " concerned primarily in guarding the rights of the " complainant. There could have been no inadvert- " ence or over-sight when the interests of the complain- " ant were being considered, for, in the very paragraph " providing for its remedy in case of a default by the " defendants, this particular remedy is mentioned, and " in such a connection that it must have suggested to " the mind, even of a layman, to say nothing about that " of a lawyer, that if it were proper expressly to reserve " the remedy of specific performance to one party, a " like reservation should be made in favor of the other " party, if it was the understanding that such remedy " was to be retained. If the principle of *expressio unius* " *est exclusio alterius,* is not pertinent, it is difficult to " imagine to what collocation of words or what phrase- " ology it can be considered applicable.

"To invoke the remedy of specific performance, a

" contract should be fair and free from ambiguity. Can
" it be said with any degree of certainty that Clark
" would have signed this contract if it had contained a
" stipulation providing that at the election of complain-
" ant the specified damages could be waived and he
" could be required to pay the full purchase price of
" $400,000? The apparent meaning of the instrument
" is, that in case of refusal to purchase, the only remedy
" against the defendants is one for damages. This is
" the probable construction which Clark, Whitmore,
" and Sizer gave to it, for, to a layman, that would ap-
" pear to be its plain intent and meaning. As to those
" learned in the law, the most that can be said is that
" there would be a diversity of view. This is well il-
" lustrated by the dilemma in which the officers of the
" complainant, some of whom are lawyers, found them-
" selves when they came to decide upon what course
" the company should pursue after the defendants de-
" faulted. Mr. Burney, one of such officers, testified in
" another case growing out of the transactions, as fol-
" lows: 'This contract stipulated for $100,000, and it
" 'was in our minds quite doubtful whether or not we
" 'would have to resort to that and claim the legal rem-
" 'edy provided in that contract, in view of the fact that
" 'it was not provided in the contract that we could have
" 'specific performance; while it was provided in the
" 'option contract that they could have specific per-
" 'formance. From some oversight it was left out that
" 'we were entitled to it, and, being left out, we feared

" 'that the construction of the contract would be that we
" 'had left out that right—had stipulated in favor of
" 'Clark and left it out in favor of ourselves. We great-
" 'ly had doubt of the right to specify performance un-
" 'til the matter of right was heard before Judge Mor-
" 'row at San Francisco, the demurrers taken under ad-
" 'visement, and it was a very grave question for a long
" 'time whether we had any right to specific perform-
" 'ance at all.'

"The statement that 'from some oversight it was left
" out,' is obviously a mere conclusion of the witness, of
" a self-serving nature, and is, at the same time, difficult
" to harmonize with other facts and circumstances in
" evidence. For illustration, the same witness, while
" testifying in this case, said: 'The contract was intend-
" 'ed, and it is very clear and thorough, and, according
" 'to my view, expresses what had been agreed upon be-
" 'fore the contract was written, and expresses the final
" 'understanding of all the parties to it, just as it was
" 'agreed upon between them.'

"It is incredible that the failure expressly to reserve
" this right to the complainant was accidental, but if
" such were the case, it does not follow that the result
" would be different. There is no evidence of any
" knowledge upon the part of Clark or his associates
" of the intention of the complainant to retain such a
" right, and their obligations are measured by the terms
" of the written contract, fairly construed, doubt, where
" there is a substantial ambiguity, being resolved against

" the complainant. If complainant's officers and attor-
" neys, after the two possible constructions were sug-
" gested to them, could not, among themselves, agree
" as to the meaning of the instrument in this respect,
" upon what theory can the agreement be held to be free
" from ambiguity?

*"Upon this branch of the case, the conclusion reached
" is that, in the light of the record, the contract, fairly
" construed discloses an intention to withhold from
" complainant the right to require the defendants spe-
" cifically to perform."*

Transcript, pp. 160-164.

I.

THE COURT ERRED IN ASSUMING AND IN RETAINING JURISDICTION IN EQUITY OF THIS SUIT BECAUSE THE COMPLAINANT HAD BARRED ITSELF OF THE RIGHT TO SUE FOR SPECIFIC PERFORMANCE.

The general jurisdiction of Courts of Equity to decree specific performance of contracts, is limited by several considerations, and these limitations are recognized as jurisdictional. Thus, if the bill shows that the remedy at law is adequate, Courts of Equity are without jurisdiction. Again, if specific performance was impossible at the time of commencing the suit, and this fact was known to the plaintiff, the Court of Equity

may not assume jurisdiction for the purpose of awarding damages.

Pomeroy Spec. Perf. of Cont., Sec. 475.

If the contract itself has such terms and provisions that a Court of Equity is unable to render a decree ordering their performance, or to carry such a decree into effect, it is without jurisdiction of the subject matter of the suit.

Pomeroy Spec. Perf. of Cont., Secs. 304 and 307.

The contract upon which the bill was based, and which was set out by the bill, *disclosed "an intention to "withhold from the complainant the right to require "the defendants specifically to perform."* This was the conclusion reached by the lower Court, and the decree must rest upon it or upon nothing.

The conclusion was correct under the rule that *expressio unius est exclusio alterius.* The reasoning of the lower Court on this point is in accord with that of the cases relied on by the appellant.

O'Neill vs. *Van Tassell,* 137 N. Y., 297-300;
Hammerquist vs. *Swenson,* 44 Ill. App., 627.

The appellant expressly asserts the correctness of this conclusion upon the construction of the contract and the appellee is estopped to deny it. Nothing is better settled than that one who procures or acquiesces in a ruling can not be heard to object to it, nor than that on

appeal the respondent can not object to a ruling on which his judgment rests. The appellee's judgment rests on this ruling, and there is no cross-appeal.

Bolles vs. *Outing Co.,* 175 U. S., 262;
U. S. vs. *Blackfeather,* 155 U. S., 218;
London vs. *Shelby Co.,* 14 Otto, 766;
Clark vs. *Killian,* 13 Otto, 766;
Chittenden vs. *Brewster,* 2 Wall., 191.

The contract was before the Court below on the hearing on demurrer. It disclosed an intention to withhold from the complainant the right to require the defendants specifically to perform. The complainant prayed for the very right so withheld, and the defendant Clark, demurred on the ground, among others, that "it appears " by complainant's own showing that it is not entitled " to the relief prayed for" in the bill.

Transcript, p. 43.

The right of the complainant to bring its suit was the first question to have been determined.

Osborn vs. *Bank of U. S.,* 9 Wheat., 738.

The suit was brought directly in opposition to the terms of the contract. The relief demanded could not be granted. In a case similar in principle, Mr. Justice Washington, speaking for the Supreme Court said: " It would be an affectation of decreeing specific per- " formance contrary to the terms of the contract upon

" which the decree was to operate. It would be, in " fact, to make a contract for the parties altogether dif- " ferent from that which they had made for themselves, " and then to decree an execution of it. *There is no* " *precedent and no principal in equity to sanction such* " *a decree. Either the contract must be executed ac-* " *cording to its terms, or it can not be executed at all.*"

Hepburn vs. *Dunlop,* 1 Wheat., 199.

According to the terms of the contract the complainant was not entitled to require the defendants specifically to perform. Its demand for the very thing it had contracted it should not have was in itself a breach of its contract. On its part it was not performing. Its demand was unconscionable. Its hands were not clean when it extended them in prayer for that which it had contracted not to ask. It had agreed that the remedy at law which it had provided was adequate. There was no equity in its bill. The Court was without jurisdiction because the lack of equity appeared on the face of the bill and the contract exhibited.

Specific performance will never be granted to one whose bill shows a breach of the contract on his own part nor to one who has provided in his contract an adequate remedy at law.

Rutland Marble Co. vs. *Ripley,* 10 Wall., 239.

The fact that the right to demand specific performance was withheld, left the complainant only its remedy

at law. Having so contracted it can not be heard to say that the remedy it contracted for was inadequate.

"It has been insisted by counsel for the appellants " that there is a complete remedy at law, and that the " bill must therefore be dismissed. Such must be the " consequence if the objection is well taken. IN THE JU- " RISPRUDENCE OF THE UNITED STATES THIS OBJECTION " IS REGARDED AS JURISDICTIONAL, and may be enforced " *sua sponte,* though not raised by the pleadings nor " suggested by counsel."

Kearny vs. *Denn,* 15 Wall., 51;
Allen vs. *Pullman Co.,* 139 U. S., 658;
Thompson vs. *Cent., Etc., R. R.,* 6 Wall., 134;
Lewis vs. *Cocks,* 23 Wall., 466;
Parker vs. *Winnipiseogee Co.,* 2 Black, 545;
Oelrichs vs. *Williams,* 82 U. S., 211;
Grand Chute vs. *Winegar,* 15 Wall., 373;
Litchfield vs. *Ballou,* 114 U. S., 190;
Memphis vs. *Brown,* 20 Wall., 289.

The objection to the jurisdiction was made in the first instance by demurrer to the bill. It was urged on final hearing. It is insisted upon here. The demurrer should have been sustained and the bill dismissed.

Neither the complainant nor the defendant Clark would have been injured by dismissal on demurrer. By the persistence of the complainant in its wrongful suit the defendant Clark has been put to expenses amount-

ing to several thousands of dollars which can not be recovered as costs, and the complainant's own position may have been changed to its injury. At the time of the ruling on demurrer, the following language of the Supreme Court of Wisconsin would have been peculiarly apt: "None of the reasons exist here which have some-" times led Courts of Equity to give redress by way of " damages when they find specific performance beyond " their power or duty. The present case is before us " at its very inception. Testimony has not been taken. " No bar of limitation has run against a proper action " at law."

Park vs. *Minneapolis, Etc., Co.* (Wis.), 45 N. W., 532.

In this suit the defendant was not legally incapacitated from performing, but the complainant by its contract had legally incapacitated itself from demanding specific performance. With this explanation, the statement of the Supreme Court of Washington applies to the retention of the suit to assess damages. It said: " In an action for specific performance where the de-" fendant, without any fault of his own is legally inca-" pacitated from performing the contract, and this fact " is known to the plaintiffs when they commence suit, " THE COURT HAS NO JURISDICTION OF THE CASE; AND, " HAVING NO JURISDICTION TO DECREE SPECIFIC PER-

" FORMANCE, IT CAN RENDER NO ALTERNATIVE JUDG-
" MENT FOR DAMAGES."

Konnerup vs. *Framsden* (Wash.), 36 Pac. Rep., 493-495;
Morgan vs. *Bell* (Wash.), 28 Pac. Rep., 928-929;
Eastman vs. *Reid* (Ala.), 13 Sou. Rep., 46.

That the complainant's officers and solicitors at the time of commencing the suit did know or ought to have known the complainant was not entitled to specific performance a reading of the opinion, which reviewed the evidence, leaves no doubt. The testimony of Mr. Burney, one of the officers and one of the solicitors of the complainant, that it was provided in the contract that the defendants could have specific performance and that a similar provision in the interest of the complainant was left out, makes it incredible, says the judge who wrote the opinon, "that the falure to expressly reserve this right to the complainant was accidental."

Transcript, p. 164.

If the provision was left out of the contract as Mr. Burney declares, and the contract itself shows, and, if, further, it is incredible that this was accidental, then it follows, as the night the day, that the complainant's officers and solicitors, at the time the suit was brought knew it had no right to sue for specific performance.

If in spite of the incredibility of Mr. Burney's state-

ment that it was left out by some oversight, and if this Court does not take the view of the lower Court that this statement of Mr. Burney is "obviously a mere con- "clusion of the witness, of a self-serving nature, and is "at the same time difficult to harmonize with other "facts and circumstances in evidence," still at the time the complainant's suit was filed its officers and solicitors knew it had no right to a decree for specific performance.

In the opinion below it was said: "There is no evi- "dence of any knowledge upon the part of Clark or "his associates of the intention of the complainant to "retain such a right and their obligations are measured "by the terms of the written contract, fairly construed, "doubt, where there is substantial ambiguity, being re- "solved against the complainant. If complainant's of- "ficers and attorneys, after the two possible construc- "tions were suggested to them, could not among them- "selves, agree as to the meaning of the instrument in "this respect, upon what theory can the agreement be "held free from ambiguity?"

Transcript, p. 164.

If it was ambiguous, then the Court of Equity was without jurisdiction. There was no equity in the complainant's cause. Mr. Justice Washington, speaking for the Supreme Court said: "The contract which is "sought to be specifically executed ought not only to "be proved, but the terms of it should be so precise as

"that neither party could reasonably misunderstand "them. If the contract be vague or uncertain, or the "evidence to establish it be insufficient, *a Court of* "*Equity will not exercise its jurisdiction to enforce it,* "but will leave the party to his legal remedy."

Colson vs. *Thompson,* 2 Wheat., 336;
Dalzell vs. *Dueber, etc., Co.,* 149 U. S., 315.

If the right to require the defendants specifically to perform, was withheld by the terms of the contract a Court of Equity was without jurisdiction to order that against which the parties contracted. If, on the other hand, the contract was ambiguous in this regard a Court of Equity was without jurisdiction to make a decree of specific performance. In either case the only right of the complainant was to demand money compensation for a breach of the contract.

In view of the fact that the defendant Clark objected to the jurisdiction of the Court by demurrer to the original and amended bills, urged the objection on the final hearing, and here insists upon it, the following language of Mr. Justice Davis, in deciding that where demand was made for a money judgment the case did "not present a single element for equitable jurisdiction or relief," to our minds, is conclusive:

"Has a Court of Equity jurisdiction over such a case "as is presented by this record? If it has not, the de- "cree of the Court below must be reversed, the bill dis-

" missed, and the parties remitted to the Court below " to litigate their controversies in a Court of Law. Us- " ually where a case is not cognizable in a Court of " Equity, the objection is interposed in the first in- " stance, but if a plain defect of jurisdiction appears at " the hearing or on appeal, a Court of Equity will not " make a decree. *Penn.* vs. *Lord Baltimore*, 1 Ves., " 446."

Thompson vs. *Cent. Etc., R. R.*, 6 Wall., 134.

II.

THE COURT ERRED IN NOT DISMISSING THIS SUIT AND IN NOT REMANDING THE COMPLAINANT TO A COURT OF LAW FOR THE TRIAL OF ITS RIGHT TO A MONEY JUDGMENT FOR BREACH OF CONTRACT IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE VII OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The decree was for a sum of money to be paid as damages as for a breach of the contract in suit. Since the prayer of the bill was for specific performance this decree must have been based on the determination of the Court that for some reason the complainant could not have the contract specifically enforced. The reason assigned in the opinion filed below was that the contract, "fairly construed discloses an intention to withhold from complainant THE RIGHT TO REQUIRE THE DEFENDANTS SPECIFICALLY TO PERFORM."

Transcript, p. 164.

"What, if any, relief then," asks the Court below, "can be awarded to complainant in this suit?" Answering this question it awarded a judgment for $100,000 liquidated damages.

Transcript, p. 164.

In other words the Court upon a reading of the contract decided that this was not a case for the exercise of its equitable jurisdiction, but one to enforce a promise to pay $100,000. Thereupon, disregarding such defenses as in a Court of Law the defendant might have urged, judgment was given for $100,000 merely on the ground that it had not been paid.

In principle this is not to be distinguished from a suit brought on the equity side of the Court, with a prayer for specific performance of a contract in the form of a promissory note for $100,000. The Court in such a case, resting on the action of the Court below, might as well say this is not such a contract as in equity can be ordered specifically performed, but it is a valid contract, the defendant agreed to pay $100,000, he has not paid it, therefore, I will deprive him of the right to present his defenses to a jury and will forthwith enter judgment against him.

In the view of the Court below the action was one simply for the recovery of a money judgment, although brought in the guise of a suit for specific performance. Of a similar attempt to invoke the equitable jurisdiction of a suit simply to recover specific property by set-

ting forth the formal allegations of a bill to quiet title, Mr. Justice Field, speaking for the Supreme Court said: "Where an action is simply for the recovery and "possession of real or personal property, or FOR THE "RECOVERY OF A MONEY JUDGMENT THE ACTION IS ONE "AT LAW."

Whitehead vs. *Shattuck,* 138 U. S., 146;
Thompson vs. *Cent. R. R.,* 6 Wall., 134;
Phoenix L. I. Co. vs. *Bailey,* 13 Wall., 616.

In this case the only judgment that could have been rendered was for money damages. It was an action at law. The remedy at law was adequate. If, as was said by the lower Court, the contract was valid and had been broken, and if the defendant had no legal defense to the promise to pay $100,000, then the only judgment which could have been entered, was as well in the power of a Court of Law as of a Court of Equity.

"The equity powers of the Court can only be invoked "by the presentation of a case of equitable cognizance. "THERE CAN BE NO SUCH CASE, AT LEAST IN THE FED- "ERAL COURTS, WHERE THERE IS AN ADEQUATE REMEDY "AT LAW."

San Francisco Nat. Bk. vs. *Dodge,* 197 U. S., 70.

"On the facts shown the remedy at law is full, ade- "quate and complete. It will be a sorry day when "equity begins to assume unnecessary burdens, and to

" interfere with simple problems which can more easily
" be solved by law."

Bernier vs. *Griscom-Spencer Co.,* 169 Fed. Rep., 889.

Mr. Justice Brown, speaking for the Supreme Court, in a case involving the application of a state statute enlarging the powers of Courts of Equity in the matter of suits to quiet title, said: "These statutes have generally
" been held to be within the constitutional power of the
" legislature; but the question still remains, to what ex-
" tent will they be enforced in the Federal Courts, and
" how far are they subservient to the constitutional pro-
" vision entitling parties to trial by jury, and to the ex-
" press provision of the Revised Statutes, section 723,
" inhibiting suits in equity in any case where a plain,
" complete and adequate remedy may be had at law.
" *These provisions are obligatory at all times and under*
" *all circumstances, and are applicable to every form of*
" *action* . . . Section 723 has never been regarded,
" however, as anything more than declaration of the ex-
" isting law (*Boyce* vs. *Grundy,* 3 Pet., 210), and as
" was said in *New York Guaranty & I. Co.* vs. *Mem-*
" *phis Water Co.,* 107 U. S., 205, 210, was intended to
" emphasize the rule, and to impress it upon the atten-
" tion of the courts."

Wehrman vs. *Conklin,* 155 U. S., 314.

"In the Judiciary Act of 1789, by which the first Con-
" gress established the judicial Courts of the United
" States defining their jurisdiction, it is enacted that
" 'suits in equity shall not be sustained in either of the
" 'Courts of the United States, in any case where a plain,
" 'adequate and complete remedy may be had at law.'
" Act of Sept. 24, 1789, Chap. 20, Sec. 16, 1 Stat. at L.,
" 82; Rev. Stat., Sec. 723. Five days later, on September
" 29, 1789, the same Congress proposed to the Legisla-
" tures of the several States the article afterward ratified
" as the Seventh Amendment of the Constitution, which
" declares that 'In suits at common law, where the value
" in controversy shall exceed twenty dollars, the right of
" 'trial by jury shall be preserved.' 1 Stat. at L., 21, 98.

"The effect of the provision of the Judiciary Act as
" often stated by this Court, is that 'Whenever a Court
" 'of Law is competent to take cognizance of a right, and
" 'has power to proceed to a judgment which affords a
" 'plain, adequate and complete remedy, without the aid
" 'of a Court of Equity, the plaintiff must proceed at
" 'law, because the defendant has a constitutional right
" 'to a trial by jury.' "

Buzard vs. *Houston,* 119 U. S., 347;
Hipp vs. *Babin,* 19 How., 271;
Scott vs. *Neely,* 140 U. S., 106;
Smyth vs. *New Orleans, etc., Co.,* 141 U. S., 656;
Killiam vs. *Ebbinghaus,* 110 U. S., 568;
Phoenix L. I. Co. vs. *Bailey,* 13 Wall., 616.

The contract discloses an intention to withhold from the complainant the right to require the defendants specifically to perform. Under the most favorable circumstances, therefore, the only remedy the complainant had was a suit at law for money damages. That remedy was plain, complete and adequate, and the Court of Equity was without jurisdiction of the subject-matter of the suit. In spite of all this the lower Court declaring, in effect, that the contract was without equity, it attempted to exercise for the award of damages the very jurisdiction it had never acquired. How could it exercise in any way a power it did not have?

All of the cases in which the ancillary power of Courts of Equity to award compensatory damages where the specific equitable relief prayed for can not be given, recognize that this power can be exercised only in a case where the equitable relief might have been given.

McQueen vs. *Chouteau's Hrs.,* 20 U. S., 222;
Cole vs. *Getzinger* (Wis.), 71 N. W., 75-81;
Eastman vs. *Reid* (Ala.), 13 Sou., 46;
Morgan vs. *Bell* (Wash.), 28 Pac. Rep., 928, 929;
Konnerup vs. *Framsden* (Wash.), 36 Pac. Rep., 493, 495;
Pomeroy Specific Perf., Secs. 474, 475;
Pomeroy's Equity, Secs. 237 and 1410.

For instance, in a suit for specific performance

brought by the vendee, if the vendor has deprived himself of the title, the vendee may have damages solely because he was entitled in equity to have that which the defendant vendor had contracted he should have. There is no case brought by a vendor against the vendee where compensatory damages have been awarded in equity contrary to the terms of the contract. If the vendee refuses to perform his contract the vendor must elect between two distinct remedies. If he sues for specific performance he may have a decree in a proper case requiring the vendee to fulfill his contract, but he can not have damages for a breach of the contract. All that the complaining vendor could have in such a suit would be a judgment for the money value of the property which the defendant would be compelled to receive.

The decision of the Court below is attempted to be supported on the authority of *Cathcart* vs. *Robinson,* 5 Pet., 264. The opinion in this case contains an excerpt from that case which shows its inapplicability to the facts here. The excerpt is requoted by us, the italics and caps being ours. Before the quotation particular attention is called to the facts of that case as distinguished from the facts of this.

In the Cathcart case, Cathcart, the defendant below, entered into the contract upon the understanding that if he did not want to take the property he might buy his release from the contract by paying $1000 to Robinson the owner; it was an alternative right given

to Cathcart by the contract. In the Court of Equity, he set up his right to pay the $1000, not as damages for a breach of the contract, but as a penalty provided for in it, and the Court very properly enforced the contract upon the sole ground that Robinson's right to sue for specific performance was not defeated by the alternative right set up by Cathcart.

In this case the lower Court found that the complainant had no right to sue for specific performance, that right having been expressly withheld from it, and the provision for liquidated damages was not an alternative right of the defendants to pay a penalty, but a right to have damages proved in accordance with the rules of the common law, before a common law jury. Clark never set up any claim that he might pay $100,000 as a penalty, he was never advised by any pleading that a demand for any penalty would be made, and he has never been afforded an opportunity of showing to a jury that notwithstanding the provision for liquidated damages, the complainant was not injured but was itself in fault.

The quotation from *Cathcart* vs. *Robinson,* upon which the lower Court based its opinion, begins as follows:

"It has been urged by counsel that *if the* PENALTY
" *only can be decreed,* this bill ought to have been dis-
" missed because the penalty might have been recov-
" ered at law."

In the present case there never was any question of decreeing a penalty. On demurrer and on the hearing, the complainant asserted its right to have specific performance and the defendant Clark denied that any such right existed under the contract. The lower Court determined that the contract disclosed an intention to withhold that right, and having so determined it attempted to award a penalty which had never been contracted, for which suit had never been brought, and which the defendant Clark did not as did Cathcart set up as a contractual right.

The Cathcart case stands alone, and is supported solely because the defendant in equity claimed the right to pay the contractual penalty. The Court took his version of the contract and enforced it in a suit which the plaintiff had a right to maintain. In this case the complainant, under the Court's construction of the contract, had no right to bring or maintain the suit.

The Cathcart case is the only one we have been able to find in which a Court of Equity has enforced a penalty. There it was enforced because the defendant demanded it. Mr. Chief Justice Marshall, who rendered the opinion in the Cathcart case, in another case said: "As a Court of Chancery is not the proper tribunal for "enforcing forfeitures, no decree for the purpose of "effecting that object ought to have been made."

Horsburg vs. *Baker,* s. c., I Pet., 232-236.

It may be contended that this was before the decision in the Cathcart case. The same rule has repeatedly been announced since the Cathcart decision. "Equity never, under any circumstances, lends its aid "to enforce a forfeiture or a penalty, or anything in the "nature of either," said the Supreme Court, in not one but in so many cases that a citation of three only subsequent to the Cathcart decision is sufficient.

Marshall vs. *Mayor, etc., of Vicksburg,* 15 Wall., 146;
Jones vs. *N. Y. Guaranty, etc., Co.,* 11 Otto, 622;
Stevens vs. *Gladding,* 17 How., 447.

The quotation from the Cathcart case, in the opinion of the Court below, continues as follows:

"The right of the vendor to come into a Court of "Equity to enforce a specific performance is unques- "tionable. Such subjects are within the settled and "common jurisdiction of the Court."

This right of a vendor to come into a Court of Equity, of course, may be waived either by laches, unfair dealing, or by express contract. The lower Court finds that the vendor's right in the present case was waived by the terms of the very contract upon which the suit was brought. *"The contract,"* it is concluded, "*fairly construed discloses an intention to withhold* "*from complainant the right to require the defendants* "*specifically to perform.*" The general rule stated in

the Cathcart case is modified in this case by the contract on which the suit was brought, just as the general rule in regard to the non-enforcement of penalties in equity was modified by the particular contract in the Cathcart case.

The quotation from the Cathcart case continues as follows:

"It is equally well settled that IF JURISICTION AT-
" TACHES, the Court will go on and do complete justice,
" although in its progress it may decree on a matter
" which was cognizable at law." In the Cathcart case the plaintiff had the right to sue for specific performance and unless the defendant had chosen to set up his alternative right to pay the penalty, specific performance would have been decreed. In this case specific performance never could have been decreed because the contract withheld from the complainant the right to have the defendants specifically perform. In the Cathcart case jurisdiction attached; in this case jurisdiction never attached, because the contract having been set up by the bill it appeared that regardless of any other fact the relief prayed for could not be granted.

The quotation from the Cathcart case continues as follows:

"Mr. Robinson could not have sued for the penalty
" *at law* WITHOUT ABANDONING HIS RIGHT TO ENFORCE
" THE CONTRACT OF SALE." This clearly shows the dif-

ference between the Cathcart case and the present one. If the Rosario Mining and Milling Company had sued at law, it would have abandoned nothing of its rights. It never had a right to enforce the contract of sale. That contract disclosed the intention of withholding the right to have the defendants specifically perform.

"He" (Robinson) "could not be required or expected to do this" (i. e., abandon his right to enforce the contract of sale), the quotation from the Cathcart case continues, "Consequently HE CAME PROPERLY INTO A "COURT OF EQUITY, and the Court ought to do him jus- "tice." In the present case the complainant came improperly into a Court of Equity. There was no justice in its demand for something withheld from it by the contract, and having sued for what it had contracted not to ask for, justice demanded that the contractual and the constitutional rights of the defendant should be protected.

The quotation from the Cathcart case closes as follows:

"It" (the Court) *"ought to direct Mr. Cathcart to "pay that which he says was to be,* ACCORDING TO HIS "UNDERSTANDING, *a substitute for the principal subject "of the contract."* In this case, the defendant Clark never understood that he was to pay $100,000 as a substitute for the principal subject of the contract. He never made any such claim. In the Cathcart case the Court adopted the construction of the contract relied

upon by the defendant, and determined that while the complainant had the right to demand specific performance, the defendant might defeat that right by a substituted payment of a penalty of $1000, and the Court properly enforced the contract as the defendant understood it and claimed it should have been enforced. In this case, also, the Court adopted the construction of the contract relied upon by the defendant, under which construction the complainant never had a right to have the contract specifically enforced. The Court determined that the contract disclosed a clear intention to withhold that right. In other words, in the Cathcart case, the Court dealt with the contract just as the parties understood it, while in this case the Court dealt with the contract in a way that neither party nor the Court understood it.

It is suggested in the opinion filed below that if the complainant could not have either specific performance or damages in this suit, it is left practically without a remedy.

Transcript, p. 167.

At the time the suit was wrongfully brought in a Court of Equity the Courts of Law were open to the complainant, and it might there have sued Clark alone. At the time the demurrer to its bill was filed and argued it might still have gone into the law Court where it had agreed to go. If it persisted in bringing a suit it ought not to have brought and in refusing to bring

the only suit it had any pretext of an excuse for bringing until by lapse of time it forfeited its right, it is in no worse and in no better position than any other person who sleeps upon his rights. The fact that a right at law can not be enforced offers no excuse for a Court of Equity exercising jurisdiction not equitable in its nature.

"A Court of Equity can not, by avowing that there is "a right but no remedy known to the law, create a "remedy in violation of the law, or even without the "authority of law."

Rees vs. *Watertown,* 19 Wall., 107;
Thompson vs. *Allen Co.,* 115 U. S., 550.

The fact that the complainant contrary to the provisions of the contract binding upon it has persisted in its inequitable claim, and so by its own wrong may have lost its legal rights, offers no excuse for asserting an equitable jurisdiction which never existed. Mr. Justice Daniel, for the Supreme Court, in speaking of the circumstances and attitude under which the approach to a Court of Equity was made, stated the following principles of equity jurisprudence, which, he said, may be affirmed without exception:

"That whosoever would seek admission to a Court of "Equity must come in with clean hands; that such a "Court will never interfere in opposition to conscience

" and good faith; and again, and *in intimate connection* " *with the principle just stated, that* IT WILL NEVER BE " CALLED INTO ACTIVITY TO REMEDY THE CONSEQUEN- " CES OF LACHES OR NEGLECT, or want of reasonable " diligence. *Whenever, therefore, a competent remedy* " *or defense shall have existed at law, the party who* " *neglected to use it will never be permitted here to sup-* " *ply the omission to the encouragement of useless and* " *expensive litigation, and perhaps the subversion of* " *justice.*"

Creath's Adm'r. vs. *Sims,* 5 How., 192-204;
King vs. *Hamilton,* 4 Pet., 311-328.

The application of this statement to the present case is apparent. Can it be said that a complainant which had contracted that it would not require the defendants specifically to perform, came with clean hands to a Court of Equity praying that the defendants be required specifically to perform? Would it not be in opposition to conscience and good faith for a Court of Equity to give to such a complainant what it was not entitled to have? Can a Court of Equity thus be called into activity to remedy the neglect of the complainant to bring its suit at law?

In this case the legal remedy has existed, and the complainant neglected to assert it. To permit it here to supply its omission would mean a subversion of justice. It failed to show any ground for equitable relief, and the bill should have been dismissed.

"Where a party alleges equitable grounds for relief,
" and the allegations are not sustained, as where a bill
" is founded on an allegation of fraud, which is not
" maintained by the proofs, the bill will be dismissed
" in toto, both as to the relief sought against the alleged
" fraud, and that which is sought as incidental thereto."

Clark vs. *Wooster,* 119 U. S., 322.

The appellant has been put to useless and expensive litigation and he has been deprived of those very benefits of which he was assured by the Seventh Amendment to the Constitution. The appellant in the first instance objected to the jurisdiction of the Court to decree a specific performance of the contract. That was the express remedy the complainant demanded. The prayer for general relief was no notice to him that the Court in declaring itself to be without jurisdiction in equity would assert a power to render a judgment at law. The entire case was tried upon the theory that the complainant was suing for specific performance of the contract to purchase. It had the choice of remedies and elected to sue for that which could be awarded, if at all, only in equity. By its election it waived its remedy at law. It was entitled to a decree of specific performance or it was entitled to nothing.

"It is true there was a prayer for general relief, but
" relief given under a general prayer must be agree-
" able to the case made by the bill, and in this instance
" the complainant sought a preventative remedy only."

Allen vs. *Pullman, etc., Co.*, 139 U. S., 658;
Cates vs. *Allen*, 149 U. S., 451.

In the present case if the complainant had pleaded the contract as construed by the Court below, and had prayed for liquidated damages, there can be no doubt that the bill would have been dismissed. How, then, can the Court render a decree, which if it had been foreshadowed in the bill, would have been denied for lack of jurisdiction?

The complainant set forth a contract and its breach. The defendant alleged fraud in the inception of the contract, that his consent to it had been obtained by a fraudulent conspiracy, that he had received no consideration for it, and that the title to the land the complainant agreed to sell him was defective. These defenses would all have been available to him at law, as would also one which he did not set up because the bill gave him no warning that he would be called upon to defend against a suit for damages, namely, that the complainant had suffered no injury.

In discussing the appellant's right to a jury trial upon the issue of fraud, no attack is made here upon the conclusion of the lower Court based on the conflict of evidence on that subject. That the evidence was conflicting and fraught with no little degree of doubt appears from a reading of that portion of the opinion filed below which dealt with the evidence on this issue.

The right to have this evidence heard by a jury of twelve men, and the conflict in it determined by them was a substantial right of which the appellant has been deprived.

Who can say that the verdict of twelve practical men, taken from different walks of life, would have been the same as the decision of the judge trained to a nice differentiation of language? Who can be sure that the very niceties of ambiguous speech which the ordinary man would stamp as the badge of fraud were not those which satisfied the single judge that the complainant's officers and agents had not made actual misrepresentations? Whether or not this Court would have reached a different conclusion than that reached by the trial judge, or whether or not a jury would have reached the same conclusion, matters not on this appeal. The appellant had the right to have the verdict of the jury.

"It may be said in general that there is no class of " cases which are more peculiarly within the province " of a jury than such as involve the existence of fraud."

Sonnentheil vs. *Brewing Co.*, 172 U. S., 401-410.

"It appears to me," said Judge Story, "that under " these circumstances, and in matters connected with the " common business of practical life, where the experi- " ence of a jury might be of great advantage to aid the " Court in its ultimate decision, it is exactly such a case

" as ought to be submitted to a jury upon an issue to be " framed for that purpose."

Dexter vs. *Providence Aqueduct Co.,* 7 Fed. Cas. No. 3864, page 619.

Mr. Justice Miller, in discussing the right of trial by jury, said: "In my experience in the conference room " of the Supreme Court of the United States, which " consists of nine judges, I have been surprised to find " how readily those judges come to an agreement upon " questions of law, and how often they disagree in re- " gard to questions of fact which apparently are as clear " as the law. I have noticed this so often and so much " that I am willing to give the benefit of my observation " on this subject to the public, that judges are not pre- " eminently fitted over other men of good judgment in " business affairs to decide upon mere questions of dis- " puted fact."

The System of Trial By Jury, 21 Am. Law Rev., page 863.

Judge Whelpley, of the New Jersey Court of Errors and Appeals, said: "One mind is apt to go astray in its " conclusions, unless checked and moderated by the " views of some other who looks at the question from " another station seeing it in another light, and having " attended to another part of the subject, perhaps over- " looked by the other."

Black vs. *Shreve,* 13 N. J. Eq., 455-469.

Such statements as these might be added interminably but enough has been said to show that a jury of twelve men might not have reached the conclusion of the judge below upon the issue of fraud.

This issue of fraud as well as that of the lack or failure of consideration for the contract based on the defective title of the complainant involved conflicting evidence of many complicated facts, and the appellant had the right to have them tried, not before a jury summoned specially to advise the chancellor, but a common law jury hearing the evidence under the common law practice. The latter jury was what was guaranteed the appellant by the Constitution, not the former.

Cates vs. *Allen,* 149 U. S., 451-459.

The assumption by a Court of Equity of jurisdiction of this suit, which it determined was a suit for damages only, deprived the appellant of an even more substantial right than the possibility that a jury of twelve men would have reached a different conclusion upon the questions of fraud, consideration and title. He was not apprised by the pleadings that the complainant claimed damages, and he did not, therefore, show that the complainant was not injured. Even though the mere failure to pay a specified sum of money constitutes a breach of the contract, and that injury to the extent of the promise is in the first instance presumed, in a Court of Law the defendant may show there has been no such injury. No Court of Law would award a judgment for the face

of a promissory note without hearing any legal defense relied upon by the maker.

If the action for damages had been brought on the law side of either a State or Federal Court in California, the relief granted would have been in conformity with the laws of the State of California. The appellant would have been permitted to show that the damages claimed were unreasonable, or that the complainant had in fact sustained no damages.

"Damages must, in all cases, be reasonable, and where " an obligation of any kind appears to create a right to " unconscionable and grossly oppressive damages, con- " trary to substantial justice, no more than reasonable " damages can be recovered."

Civil Code Cal., Sec. 3359.

"Every contract by which the amount of damage to " be paid, or other compensation to be made, for a " breach of an obligation, is determined in anticipation " thereof, is to that extent void, except as expressly pro- " vided in the next section."

Civil Code Cal., Sec. 1670.

The following section makes the exception in those cases where it would be impracticable to fix the actual damage, but this does not mean that the mere statement in the contract itself establishes such impracticability. If damages can be ascertained the stipulation for liqui-

dated damages is void, notwithstanding any form of words that may have been used; and, if no actual damage is sustained by the breach, no damages can be recovered, though stipulated for in the contract.

Eva vs. *McMahon,* 77 Cal., 467-472;
Muldoon vs. *Lynch,* 66 Cal., 536-540;
Long Beach, etc., vs. *Dodge,* 135 Cal., 401-405.

Upon this branch of the case, it is submitted that:

1. By the terms of its contract the complainant was barred of the right to have specific performance.

2. Since the Court of Equity could not under any circumstances have decreed specific performance, it never acquired jurisdiction of the subject-matter of the suit.

3. Being barred of the right to have specific performance, the complainant's only remedy was to have damages for a breach of contract, if it was injured.

4. Any demand simply for damages is of purely legal cognizance.

5. Upon such a demand the appellant is guaranteed by the Seventh Amendment to the Constitution of a trial in the forms of law before a common law jury.

"The Seventh Amendment of the Constitution of the " United States declares that 'in suits at common law, " 'where the value in controversy shall exceed twenty

" 'dollars, the right of trial by jury shall be preserved.'
" That provision would be defeated if an action at law
" could be tried in a Court of Equity, as in the latter
" Court a jury can only be summoned at its discretion,
" to ascertain special facts for its enlightenment.
" (Cases.) And so it has been held by this Court 'that
" 'whenever a Court of Law is competent to take cog-
" 'nizance of a right, and has power to proceed to a
" 'judgment which affords a plain, adequate and com-
" 'plete remedy, without the aid of a Court of Equity,
" '*the plaintiff must proceed at law, because* THE DE-
" 'FENDANT HAS A CONSTITUTIONAL RIGHT TO A TRIAL
" 'BY JURY.' " (Cases.)

Whitehead vs. *Shattuck*, 138 U. S., 146.

III.

THE COURT ERRED IN REFUSING TO CONSIDER, AND IN SUMMARILY DISPOSING OF, THE DEFENSE BASED ON THE ISSUE OF DEFECTIVE TITLE MADE BY THE PLEADINGS AND THE EVIDENCE.

The suit was brought on the equity side of the Court. The chancellor overruled the objections to jurisdiction, and awarded a judgment for liquidated damages for which, in the opinion filed by him, he said the parties had contracted. In other words, the determination was that the complainant was not entitled to have the equitable power of the Court exerted to require the de-

fendants to accept the property, but it was entitled to have that power exerted to require the defendant Clark to pay the penalty for not accepting the title to the property. The decree, if it could stand at all, must stand as a decree in equity, subject to all of the limitations surrounding such decrees.

The conclusion of the Court upon the subject of the defendant's attack on the title of the complainant, in the opinion filed below, is stated as follows: "In view "of the conclusion that the contract is a valid obliga- "tion, *the contention that complainant's title is defec- "tive may be summarily disposed of.* The defendants "were to receive from the complainant only 'the titles "'which the first party (complainant), through its di- "'rectors or otherwise, has. . . . Said titles hav- "'ing been examined by the second parties, it is agreed "'that the same are good and sufficient.' Such is the "express language of the contract, and by it the same "as any other provision, the parties are bound."

Transcript, p. 159.

This statement is at variance with well-established principles of equity jurisprudence, not only but with the recitals of the contract, the issues framed by the pleadings and the evidence.

Suppose that despite the wording of the contract it appeared on the hearing that at the time the contract was entered into both parties believed the titles of the complainant were good, but before the stipulated price

was paid it was demonstrated that the title was wholly unmarketable; under such a state of facts would any Court of Equity require the buyer to pay for what the seller could not give him?

Suppose that the seller asserted most strongly that it owned the property, and the buyer was advised by his own attorney that the title of the seller was good, and these facts were recited in the contract; suppose, further, that the seller drew the contract and inserted therein the phrase quoted in the opinion; suppose, further, that in a Court of Equity the seller should allege that its title was perfect, and should utterly fail to prove the allegation and the buyer should prove that the title of the seller was in fact defective notwithstanding the advice of his attorney at the time the contract was made, would it be consistent with the fundamental principles of equity to charge the buyer $100,000 because he refused to pay the full price set upon the property on the assumption that the title was perfect?

Suppose, again, that on final hearing in equity the defendant in a suit for specific performance should show to the chancellor the facts last above set forth, would it not be error for the chancellor to say, in a court of conscience, I will not consider these facts; here is a writing; it is valid; you are bound by it; and you must pay the penalty?

The land in suit is in the Republic of Mexico. The laws in regard to titles are different from those in this country. The language in which those laws are writ-

ten is different from that of the contracting parties. "The fact is uncontrovertible," says the judge of the Court below, "that the form and phrasing of the va-
"rious provisions and stipulations of the contract are
"the handiwork of lawyers acting upon behalf, and in
"the interest of, complainant."

Transcript, p. 160.

With this incontrovertible fact clearly in mind, the form and phrasing of the contract upon this subject of title ought to receive close scrutiny if for no other reason than that the acts of a complainant in equity are always proper subjects of examination.

The very first recital in the preamble to the contract itself is an unqualified statement, made by the attorneys for the complainant and in the interest of it, that the Rosario Mining and Milling Company is the owner of the property in suit.

Transcript, p. 23.

After listing the property it is recited that two other contracts had been executed between the parties, dated respectively December 12, 1900, and August 12, 1901, whereby the complainant offered to sell the property, the lawyers of the complainant acting on its behalf recited that in each of said contracts the vendees bound themselves to examine the titles, and after examining the property and the titles thereto had notified the ven-

dor that they were satisfied with the titles to said property in the first party.

Transcript pp. 25 and 26.

After certain other recitals not directly affecting this question of title, the first clause of the contract itself was written. It contains an offer to buy the property which the contract recited the seller owned, and provided a manner in which the offer might be accepted by the seller. The attorneys who drew the contract, and who in the first instance recited the ownership of the seller, did not in terms provide that the seller should convey the perfect title which the recitals clearly show both parties at that time believed it owned, but by an excess of caution simply provided that the seller would cause to be transferred the titles which the first party through its directors or otherwise has in or to said property. By a similar excess of caution, in spite of the recital to the same effect, the attorneys for the complainant, then incorporated in the agreement proper the following: "Said titles having been examined by the second parties it is agreed the same are good and sufficient."

Transcript, p. 28.

This excessive caution on the part of the attorneys for the complainant in the form and phrasing of the contract might warrant a belief that the over-cautious attorneys for the complainant had some reason for

doubting the sufficiency of its title, and by the stipulations of the contract sought to shut out the showing made by the defendant of its defective nature. "An "artfully contrived snare to bind the defendant in a "manner which he did not comprehend at the time he "became a party" to a contract ought not to be enforced in equity.

Pope Mfg. Co. vs. *Gormully, etc., Co.,* 144 U. S., 224-238.

Let the attorneys and officers of the complainant be given the benefit of any doubt in this matter. Let it be assumed that there was no snare intended, that in this particular they were acting in perfect good faith, that they believed the complainant had perfect title, and that they believed the allegations of the bill that the complainant was the owner in fee simple absolute. By that very allegation and its denial by the defendant the question of title was put in issue, evidence was taken upon it, and the lower Court refused to consider it.

If this evidence showed that when the contract was made both parties believed the complainant had title, and showed that both parties were mistaken in regard thereto under the laws of a foreign country, could any other conclusion be reached than that to enforce the contract so made would be unconscionable? In such a case ought not the defendant be given the fullest opportunity to show the mistake and the defect of title?

"It is a settled rule, therefore, to allow a defendant "in a bill for specific performance of a contract to "show that it is unreasonable or unconscientious, or "founded in mistake, or other circumstances leading "satisfactorily to the conclusion that the granting of "the prayer of the bill would be inequitable and un- "just."

King vs. *Hamilton,* 4 Pet., 311-328.

If the parties both believed the complainant had title and both were mistaken, would it not be unreasonable, unconscientious, inequitable, and unjust to require the defendant to take or to pay a penalty of $100,000 for not taking that which the complainant can not give?

There are many objections to the title as set forth in the answer.

Transcript, pp. 93-114.

For the purpose of showing that under the Mexican law the objections are substantial the nature of two of them will be briefly explained, one having been specially pleaded and the other appearing from the evidence introduced by the complainant.

The title to the property described in the contract was derived from three sources. A portion, it is claimed, came by purchase from Tiburcio Garcia and certain associates, among whom was W. N. McKamy. A second portion was denounced by them, or by the complainant as their successor. A third portion was

denounced for the complainant directly and patented to it. The "denouncement" in Mexican law, in many respects, is similar to the familiar location of mining claims under our law.

The articles of incorporation of the complainant were filed in the State of Texas in July, 1896, John A. Peacock, John A. Walker, Ben J. Tillar, N. W. McConnell and Avery L. Matlock being named as directors, but no organization was attempted until long after August 4, 1896.

On that day Tiburcio Garcia and W. N. McKamy for themselves and in representation of their associates attempted to enter into an agreement with Walker, Tillar and Peacock, who, according to the writing, were acting as directors of and for the Rosario Mining and Milling Company and their associated directors, N. W. McConnell and Avery L. Matlock.

In Mexico when a public writing is required by law to be entered into, as in the sale of real property, the parties and their witnesses are required to appear before the notary and to state to him the terms of their agreement. This, with many formalities fixed by statute, and the non-observance of which renders the transaction void and the notary subject to a penalty, he is required to enter in a public record, called a book of protocols. This record is then signed by the parties and witnesses and attested by the notary, the whole proceeding being known as the protocolization of the contract, the original writing being the protocol. Of this

protocol he then makes for the parties certified copies, which are technically called testimonios, and these testimonios in turn are required to be presented to the proper registration offices where the land is located for public record. Until there is proper registration of a proper testimonio no title passes.

As under our law, a grant is absolutely void if it is not signed by the grantor or his attorney in fact, so, under the Mexican law, it is void unless signed by both grantor and grantee or their legal representatives, and, if one of the parties does not appear before the notary the protocol, under penalty of invalidity, must show that the absent party was represented by an attorney in fact and the operative clause of the written power of attorney must be embodied in the contract itself.

Frac. 4, Art. 53, *Law of Notarial Functions.*

If the proper testimonio of the power of attorney is not presented to the notary he must state that fact in the protocol, and state also that for that reason the contract is null and void until the provisions of Article 1401 of the Civil Code are fulfilled, namely, until, with like formalities, the contract is ratified by the parties in interest.

Art. 55, *Law of Notarial Functions;*
Civil Code, Chihuahua, Art. 1401.

When on August 4, 1896, Peacock, Walker and Tillar attempted to enter into the Garcia contract as direc-

tors of the complainant corporation, and in its name and for it obligated it to pay $115,000 secured by mortgage, there had been no organization of the company, no stock had been issued, no directors elected by the stockholders, no officers elected, no resolution passed authorizing them to act, and, of course, no power of attorney executed to them. There being no written power of representation in existence, it could not have been set out in the Garcia deed or protocol, nor did the notary in that deed declare its nullity until the provisions of the Civil Code in regard to ratification had been fulfilled. Under the provisions of the Mexican law, the conveyance for these reasons was void absolutely, and no subsequent conveyance has ever been made.

Trans. Ex. E, Dep'n of Boix, Tr., p. 742.

This conveyance on which the complainant's title rests was exactly of the effect of a deed in this country purporting to be from an administrator of a decedent's estate not containing the statutory recitals.

The second defect in title which appeared in the evidence of the complainant, relates to the law of community property in Mexico.

It appears that the first title, or denouncement, of a large portion of the property, namely, the old mine known as "Nuestra Senora del Rosario," was issued in favor of Francisco Loya y Mascarenas, William N. McKamy and A. W. Long, and that the original or de-

nouncement title of the Nankin was to Tiburcio Garcia, Guillermo N. McKamy and Guillermo F. Thompson. Garcia, McKamy and Thompson purported to convey to Peacock, Walker and Tillar as representing the Rosario Mining and Milling Company. The title was acquired by McKamy as a married man and his wife did not join with him in the Garcia contract. The following references are to the numbers of articles in the English edition of the Civil Code of Chihuahua, the original in evidence having been transmitted as an exhibit to the deposition of Boix:

All property acquired by purchase or as it is there called by "onerous" title constitutes assets of the legal partnership of husband and wife.

Art. 2008.

Mines denounced during the marriage by one of the conjugal partners, as well as "bars" or shares acquired with the common fund, belong likewise to the social property.

Art. 2012.

All property which exists in the possession of either of the conjugal partners on making the separation thereof shall be presumed to be "ganancials" or community property *until the contrary is proved.*

Art. 2019.

The *ownership* and possession of the common property belong to both conjugal partners while the partnership subsists.

Art. 2023.

Real estate belonging to the social fund can not be obligated nor alienated in any manner without the consent of the wife.

Art. 2025.

One of the consorts having died, the survivor shall continue in the possession and administration of the social fund, *with the intervention of the executor (representative) of the will until the partition is effected.*

Art. 2068.

The partition referred to is provided for by Articles 2056, 2057, 2058 and 2060. It is further provided that a division of the "ganancials" by halves by the consorts or their heirs shall take place, whatever may be the amount of property which each of them may have brought into or acquired during the marriage, and notwithstanding that either or both may have lacked property at the time of celebrating the marriage.

Art. 2061.

All that relates to the formation of inventories and the solemnities of the partition and adjudication of the

property shall be governed by the provisions of the Code of Civil Procedure.

Art. 2071.

It appears that either spouse may by will dispose of one-half of the common property since it is negatively provided that neither can dispose by will of more than his or her one-half.

Art. 2029.

Neither the declaration of one nor the confession of the other of the spouses shall be deemed sufficient proof to overcome the presumption that all property prior to its legal division is common.

Arts. 2020 and 2019.

No alienation of the husband can prejudice the wife or her heirs.

Art. 2031.

In the Mexican law beneficiaries under a will are designated as heirs as well as those of the blood.

Arts. 3222, 3228 and 3229.

From the foregoing it appears that whatever rights the complainant acquired from McKamy under the Garcia contract did not cover the half interest of his deceased wife. There is no evidence of any legal separation of the common property of McKamy and his

wife and no evidence to show whether or not she left a will, or that it was probated or that there was any such adjudication of the identity of her heirs as is referred to in the Code. Without conveyance from Mrs. McKamy, or, if she is not living, her personal representative or her heirs under the Mexican law, her ownership in the property has never passed. Deeds from persons claiming to be her heirs are not sufficient, even though they were her children, for there is the familiar lapse in title which makes the technical examination of proceedings in estates in probate the horror of the title examiner's life.

As a general rule the decree of a Court of Probate is the only evidence that a person is entitled to property as the heir of another.

Toland vs. *Earl,* 129 Cal., 148.

If the complainant had otherwise been entitled to specific performance, upon this showing of defective title when both parties believed they were contracting in regard to perfect title, a Court of Equity would not have required the defendants to buy the property because of the mistake. How can a Court of Equity when specific performance is denied for other reasons, compel the defendants to pay a penalty of $100,000 for not buying that which the Court would never have required them to buy?

IV.

THE COURT ERRED IN OVERRULING THE DEMURRER AND IN GRANTING RELIEF IN EQUITY TO THE COMPLAINANT BECAUSE OF THE UNCONSCIONABLE NATURE OF THE CONTRACT IN SUIT, AND OF THE PROVISIONS WHICH PERMITTED ITS NULLIFICATION BY THE COMPLAINANT.

The contract contains certain recitals concerning two preliminary option contracts between the parties, an offer of $400,000 from the defendants and its refusal prior to the execution of the contract in suit. It is then recited that "it is the desire of each of the parties to "further develop said property by the development "work hereinafter stipulated *to the end of more cer-* "*tainly determining the value of said property,*" and after other recitals, the agreement is set forth.

Transcript, pp. 23-27.

After binding the parties of the second part to keep the offer of $400,000 open for a year and to accept whatever title the complainant had, the contract continues:

"Whereas, it is the desire of each of the parties to "further develop said property by the development "work hereinafter stipulated to the end of more cer- "tainly determining the value of said property, so that "the first party may be able to sell the same to the best "advantage to any purchaser which it may find and

" in the event of a sale at a figure above $600,000 " to other parties than the first party will out of such " proceeds compensate the second parties in part for " the expenditures they have made in development of " said property, as herein provided; and

"Whereas, in order to carry out this arrangement " and purpose, and to afford the second parties an " opportunity to buy said property at the price of $600,- " 000, in the event of a failure of the first parties to " make a sale of said property during the life of this " contract, at more than $600,000 and to afford the " second parties a preference right to buy said prop- " erty at the price of $600,000, as herein stipulated; " and

"Whereas, it is necessary to keep said property open " and the operating plant in operation; and

"Whereas, the second parties as a consideration in " part for this option contract is desirous of keeping " open said offer to buy said property at the price of " $400,000, subject to the right of the first party to " accept the offer at any time during the life of this " contract,

"Now, therefore, it is hereby mutually agreed be- " tween the parties hereto, as follows:

"1. The second parties offer to the first party to " buy from the first party said property, and to pay " to the first party therefor the sum of ($400,000) Four " Hundred Thousand Dollars, American Gold, at Fort " Worth, Texas, and to make said payment within

" thirty days after being notified of an acceptance by " the first party of said offer; provided, however, that " if the said offer is accepted within the next four " months, the second party shall have until Sept. 1st, " 1902, to make such payment. The first party con- " currently or as near as may be with such payment " to cause to be transferred to the second parties, the " titles which to the first party through its directors " or otherwise has in and to said property. And the " second parties agree to leave said offer open for one " year from this date, subject to the acceptance of the " first party at any time during the said year. Said " titles having been examined by the second parties it " is agreed that the same are good and sufficient.

"2. The first party, reserving the right to sell said " property and contract with reference thereto to other " parties gives and grants to the second parties an op- " tion to buy said property at the end of the said year, " to wit, on May 1st, 1903, (said option to be exer- " cised or forfeited), at the price of $600,000 cash or " its equivalent, American Gold, provided the first " party shall not have sooner sold said property, or " made a *bona fide* contract to do so; provided further " that before making any offer to sell said property at " $600,000 or less to other parties, the first party shall " give to the second parties a preference right to buy " the same at said price so offered to others, and to " that end shall notify the second parties of such con- " templated sale or offer, and the second party shall

" promptly exercise its preference right upon being so " notified and afforded an opportunity to do so, and " shall have 30 days after selecting to take the prop- " erty in which to make the payment for the property, " whereupon concurrently or as near as may be the " first party shall cause said property to be conveyed " to the second parties. If the second parties upon " being so afforded an opportunity to exercise such " preference right to purchase shall fail to do so, then " such right shall cease.

"3. The first party reserving full rights to make " any sale it may choose of said property, during the " year agrees that if during the year up to May 1st, " 1903, the first party shall sell said property or make " a valid contract of sale thereof to other parties, re- " sulting in a sale of the same, at a price greater than " $600,000, it shall pay to the second parties $50,000 " out of the excess of the purchase price above $600,- " 000, except that if such excess does not amount to " $50,000, then such amount as the purchase price " upon such sale shall exceed $600,000. Provided, " that if the purchase price upon such sale shall not " exceed $650,000, the second parties shall have the " preference right to take the property at the price of " $600,000.

"Provided, also, that in the event of a sale to other " parties, partly on a credit, the payment of the $50,000 " or the excess over $600,000, of less than $50,000, if " under this contract the second parties shall become

" entitled to it, shall be apportioned among the time " payments of the purchase money upon such sale, in " proportion as it shall bear to the whole, provided, " however, that not less than one-half of the amount " to which the second parties shall be entitled shall be " paid out of the first cash payment."

Transcript, pp. 27-36.

After further protecting the complainant, the contract bound the second parties to remain in possession and to operate the property at their expense for one year, and within ninety days to do a large amount of development work. It is then provided that "After " the end of the 90 days or the completion of said " work, if sooner completed, the second parties shall, " at the option of the first party, continue the opera- " tions of the mill and cyanide plant and to keep the " mine unwatered and for the purpose of paying the " expenses shall have the bullion output of the said " mill and cyanide plant, and if the output shall ex- " ceed such expenses then the excess shall be paid to " the first party as royalty, but no other royalty shall " be paid out of such output, but the ore so worked " during that time shall not be sorted or picked, nor " the rich streaks taken out. Provided, that after said " work so specified shall have been completed and in " any event after 90 days, the first party shall have the " right at any time to take possession of said property " and all of the improvements, betterments, machin-

"ery and appliances, tools, apparatus, building and "supplies of every kind useful in the operation of the "property; and as to all such supplies as under either "of said preceding contracts the first party is to pay "for, upon said property being turned over to it an "inventory shall be made and the same to be paid for "at their reasonable value, it being understood that in "determining what supplies and materials are to be "turned over to the first party without being paid for "and what of such supplies are to be paid for, said "original contracts are to be looked to and to govern."

Transcript, pp. 32-33.

Immediately following is a segregation of the obligations and benefits of the two parties to the contract under these provisions, as the contract is construed by the lower Court in regard to the witholding of the right of specific performance from the complainant.

DEFENDANT'S OBLIGATIONS.

1. To do a large amount of development work at their own expense within ninety days to the end of more certainly determining the value of the property.

2. To operate the property at their own expense for one year.

3. To keep open for one year an offer to buy the property for $400,000; or to pay a penalty of $100,000.

DEFENDANT'S APPARENT RIGHTS.

1. To buy the property for $600,000 at any time within one year.

2. To receive $50,000 in the event the complainant should sell the property to other parties for $650,000 or over.

3. To have possession of the property for one year in order that they might determine the value by their development work.

DEFENDANT'S REAL RIGHTS.

1. To enter into possession of the property for the purpose of completing the development work in ninety days.

2. To be paid only for their stores and supplies on hand in the event the first party took possession after ninety days.

3. To apply 80% of the gross bullion output to expenses during ninety days and to make operating expenses if they could after that time and if they were permitted to remain in possession.

COMPLAINANT'S RIGHTS.

1. To have its development work done without cost to it.

2. To have its mill operated to its full capacity for 90 days and to have 20% of the gross output regardless of the expense of getting it out.

3. To have its mine operated for a period of one year and after ninety days receive all profits made thereby.

4. To resume possession at any time after ninety days upon paying for stores on hand, and thus deprive the defendants of their apparent right of exploiting the value of the property.

5. To put the defendants to the election of buying the property for $400,000 or paying $100,000 penalty at any time within one year, should the development work prove the mine unprofitable.

6. At any time to notify the defendants that it was going to offer to sell to other parties, and thus put them to the prompt election to buy for $600,000, and to pay that sum in thirty days or forfeit all rights under the contract, and so deprive the defendants of the apparent right to buy for $600,000 at any time within one year.

7. To sell the property for $600,000 to any one at any time, notwithstanding the apparent option for one year.

COMPLAINANT'S OBLIGATIONS.

1. To pay for the stores and supplies on hand should it take possession after ninety days.

2. To sell for $600,000 at any time within one year, provided it had not sold nor made a *bona fide* contract to sell, and provided further that it had not put the

defendants to the election of buying and paying for the property prior thereto.

The reservation of the rights to take possession of the property at any time after ninety days, to sell to other parties, and by a mere notice of intention of offering the property for sale to put the defendants to the election of buying for $600,000, while the defendants were bound for the entire year, denuded the contract of all pretext of mutuality.

Apart from any discussion of the question of fraud which in the opinion of the Court below was not made out, notwithstanding that this contract may have been, as that opinion states, legal and binding, still the powers of revocation reserved by the complainant made it such as a Court of Equity would not enforce.

> *Rutland Marble Co.* vs. *Ripley,* 10 Wall., 339; *Southern Pac. Co.* vs. *Western, etc., R. R.,* 9 Otto, 191.

"No Court could allow one party to hold the other "bound, where the obligation was not reciprocal; or "to *hold himself prepared to avail himself of all fa-* "*vorable contingencies, without being affected by those* "*which were unfavorable.*"

> *Brashier* vs. *Gratz,* 6 Wheat., 538-539.

By this contract the complainant was bound to nothing, the defendants to everything.

If, after ninety days, a very rich deposit of ore had

been found the complainant might have taken possession and thus deprived the defendants of the right to determine whether it was a mere pocket or an extensive ore body, or it might have notified the defendants that it was going to offer the property for sale and on pain of forfeiture, have required them to elect to pay $600,000 in thirty days. On the other hand, if the development work proved the mining operation to be unprofitable for any reason, it might require of them to buy the unprofitable business for $400,000 or pay a penalty of $100,000. Could preparation to take advantage of all favorable contingencies, without being affected by those which were unfavorable go further?

"To stay the arm of a Court of Equity from enforc-
" ing a contract it is by no means necessary to prove
" that it is invalid; from time immemorial it has been
" the recognized duty of such Courts to exercise a dis-
" cretion, to refuse their aid in the enforcement of un-
" conscionable, oppressive, or iniquitous contracts, and
" to turn the party claiming the benefit of such con-
" tract over to a Court of Law."

Marks vs. *Gates,* 154 Fed., 481;
King vs. *Hamilton*, 4 Pet., 311-327;
Willard vs. *Tayloe,* 8 Wall., 567;
Pope Mfg. Co. vs. *Gormully,* 144 U. S., 224-236.

Can it be said that it is consistent with these cases

for a Court of Equity, without proof of injury to the complainant, without hearing the defenses of the defendant, merely because there was a valid contract, to exact a penalty of $100,000 from one only of the contracting parties?

V.

THE COURT ERRED IN MAKING ANY DECREE OTHER THAN ONE OF DISMISSAL IN THE ABSENCE OF SIZER AND THE ADMINISTRATOR OF WHITMORE'S ESTATE.

If the complainants had sued at law for damages for the breach of the contract, it might have sued one only of the co-contractors. It did not pursue the legal right which it had, but sued in Equity for specific performance. Having come into a Court of Chancery it is bound by the equity rules.

The contract was signed by Clark and Sizer and Whitmore as the parties of the second part. The complainant sued Clark and Sizer and Falconer as the administrator of Whitmore's Estate. It alleged that Sizer and Whitmore were nominal parties to the contract and had no real interest in it, and that Sizer and Whitmore's representative could not be subjected to the jurisdiction of the Court, and were not necessary parties to the suit.

To determine that Sizer and the Estate of Whitmore were merely nominal parties to the contract, was

to adjudicate upon their legal status both in relation to the complainant and to the defendant Clark.

"No Court can adjudicate directly upon a person's "right, without the party being either actually or con- "structively before the Court."

Mallow vs. *Hinde,* 12 Wheat., 193;
Barney vs. *Baltimore,* 6 Wall., 280-291;
Shields vs. *Barrow,* 17 How., 130.

Under the terms of the contract the interests of Clark and Sizer and Whitmore appear to be equal. Under another contract in evidence it was sought to show that the interests of Sizer and Whitmore were each equal to one-eighth of the whole. By oral evidence of Sizer, whose interest then was to evade liability, and by hearsay evidence of other persons it was attempted by the complainant to show in its behalf that neither Sizer nor Whitmore had any interest.

Citation of authority is unnecessary to support the proposition that a written contract can not thus be changed by parol evidence. It was not enough that the complainants' witness should state or that Sizer for his own benefit should admit that he was not bound. This might be done by collusion, and although that may not be the case here, it is not the course of a Court of Equity, to make a decree which is to operate directly on the parties in interest in their absence.

Marshall vs. *Beverly,* 5 Wheat., 313;
Shingleur vs. *Jenkins,* 111 Fed., 452.

In the suit of the State of California against the Southern Pacific Company regarding the Oakland Water Front, it was urged by the State that the Town of Oakland, the predecessor of the City of Oakland, never was an interested party because it had no power to make the grant upon which the Southern Pacific Company relied. It was claimed by the Southern Pacific Company that since the grant had been made by the Town of Oakland it was estopped by deed, and therefore was no longer an interested party. Both the complainant and the defendant, being agreed that the City of Oakland was neither a proper nor an indispensable party, therefore opposed its application to be made a co-plaintiff. The suit was brought in the Supreme Court under the constitutional provision vesting in that tribunal original jurisdiction of such cases. This jurisdiction would have been ousted by making the City of Oakland and another defendant parties.

Mr. Chief Justice Fuller, who wrote the prevailing opinion, after discussing the cases cited herein, the Act of 1839, and the 47th Equity Rule, propounded the following: "Sitting as a Court of Equity we can " not, in the light of these well settled principles, escape " the consideration of the question whether other per- " sons who have an immediate interest in resisting the " demand of complainant are not indispensable par-

" ties, or, at least, so far necessary that the cause should " not go on in their absence. Can the Court proceed " to a decree as between the State and the Southern " Pacific Company and *do complete and final justice* " *without affecting other persons not before the Court,* " *or leaving the controversy in such a condition that* " *its final termination might be wholly inconsistent* " *with equity and good conscience?*" (Italics ours.)

California vs. *S. P. Co.*, 157 U. S., 229.

In answering this question in the negative upon the facts as stated, the Supreme Court of the United States ousted itself of jurisdiction and dismissed the bill.

In that case both the complainant and defendant agreed that the City of Oakland was not interested, yet the Court was of the opinion that a decree in its absence might leave the controversy in such a condition that its final determination might be wholly inconsistent with equity and good conscience. Such is the result of the decree made in this suit.

The right of one defendant to insist upon the presence of other parties bound with him is clear.

Judge Story, than whom there was no greater Chancellor, reviewed the principles of equity governing such cases, and said: "The present is a case where co- " defendants having answered, insist upon the right to " dismiss the bill on account of the non-prosecution of " the same against Swan. It would be an intolerable " grievance, if co-defendants could not insist upon such

" a right; for it might otherwise happen, that the cause " could not be brought to a hearing against them alone; " and they might be held in court for an indefinite pe- " riod, perhaps during their whole lives, and very val- " uable property in their hands be incapable of any " safe alienation. No Court of justice, and least of all " a Court of Equity, could be presumed to suffer its " practice to become an instrument of such gross mis- " chief. We accordingly find it very clearly estab- " lished, that a co-defendant possesses such a right."

> *Picquet* vs. *Swan,* 19 Fed. Cas. No. 11,135; quoted as authority in *Jessup* vs. *Ill., etc., R. Co.,* 36 Fed., 735-741.

The test of this question does not depend upon the wealth or poverty of the parties. If the conditions had been slightly changed no doubt would exist of the proper application of the 47th Equity Rule.

Suppose Sizer had been sued here and Clark was the non-resident. Suppose the complainant's officers had believed Sizer, who was in Court, was financially irresponsible and had believed the absent Clark alone could respond. Suppose Sizer for his own benefit had sought to bring the suit to hearing and to have it adjudicated that Clark had no interest in the contract and was not bound by it. Would not the answer of the complainant that Clark could not be so relieved of liability because he was bound by the contract have been unanswerable? If the complainant could have prevented a

hearing in the absence of one of the parties to the contract, can it be heard to say the absent party is unnecessary? Suppose, further, in such a case the complainant had been willing to proceed against Sizer alone, and he had said Clark is responsible and it would be unjust to ruin him and let Clark go free, could there be any doubt that a Court of Equity would refuse to proceed to a hearing in the absence of any of the parties to the contract?

"If the interests of those present and those absent " are inseparable, the obstacle is insuperable. The Act " of Congress of 1839 and the rule of this Court upon " the subject give no warrant for the idea that parties " whose presence was before indispensable could there- " after be dispensed with."

Ribon vs. *C. R. I. & P. R.*, 16 Wall., 446.

The subject of the suit is a contract which either binds all three parties or none. No transfer of interest from the absent parties is shown. Are their interests not inseparable? Is not the obstacle to the exercise of the equity powers of the Court insuperable? Does not the judgment conclude the absent parties in contravention of the 47th Equity Rule? Does it not leave the controversy as between Clark and the absentees in such a condition that its final determination may be wholly inconsistent with equity and good conscience, within the meaning of the Supreme Court in its statement in the Oakland Water Front case?

In conclusion it is respectfully submitted that the decree appealed from ought to be reversed and the suit remanded with instructions to the Court below to enter a dismissal of the same, without prejudice to any rights which the complainant may have retained; and that such reversal is warranted because—

1. In the absence of Sizer and Falconer as the representative of Whitmore's estate, the Court had no power to make any decree other than one of dismissal.

2. The unconscionable provisions of the contract and the reserved right on the part of the complainant to nullify it, precluded a Court of Equity from enforcing it either directly or by way of exacting a penalty.

3. In disregarding the evidence of defective title and the mistake of the appellant in regard thereto he was deprived of defenses always available in equity.

4. The award of a judgment for $100,000 and interest amounting to some $35,000 more, whether by way of a forfeiture as a penalty or as damages for a breach of contract by a Court of Equity, is a deprivation of the appellant's constitutional right to a jury trial in accordance with the forms of common law.

5. The suit having been brought for specific performance and the contract showing an intention to withhold from the complainant the right to require the defendants specifically to perform, the bill was without

equity, the Court could not retain the suit for the purpose of awarding damages under the prayer for general relief and thus change the entire aspect of the case. Jurisdiction in equity did not exist to compel specific performance, and never having been rightfully acquired could not be retained nor exercised for other purposes.

Respectfully submitted.

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